No. 11,238

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEREFA MALOOF,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S PETITION FOR A REHEARING.

(Or, if a Rehearing Be Denied, For a Stay of Mandate.)

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To the Honorable Francis A. Garrecht, Senior Judge and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant herein petitions for a rehearing of this cause for the following reasons:

As stated in the brief opinion filed by this Court, the question presented by this appeal was whether "the information stated sufficient facts to constitute a crime and to adequately inform the appellant of what she was charged."

We respectfully submit that the information does neither of these essential things.

THE ALLEGATIONS OF THE INFORMATION, AS TO THE PRICE CHARGED AND FIXED BY LAW FOR THE ROOM, ARE BUT CONCLUSIONS OF THE PLEADER.

It is a fundamental principle of pleading, particularly in criminal prosecutions, that such words as "illegally", "unlawfully", "fraudulently", "contrary to law", etc., are mere words of vituperation, are conclusions and epithets used by the pleader only, and are not statements of fact; that an indictment or information must contain a statement of all the essential facts, and facts, not conclusions, must be averred. To allege that the thing which was done was unlawful, or contrary to law or in excess of a limit fixed by law, is a mere conclusion of the pleader; the facts supporting such conclusion must be alleged.

Broadus v. United States, 30 Fed. (2d) 394;
Brown v. United States, 21 Fed. (2d) 827;
Cooper v. United States, 299 Fed. 483;
Anderson v. United States, 294 Fed. 593;
United States v. Illig, 288 Fed. 939;
Middlebrooks v. United States, 23 Fed. (2d) 244.

In *Asgill v. United States,* 60 Fed. (2d) 780, the Circuit Court of Appeals, in construing Section 556 of Title 18, U. S. C. A., which provides that no indictment shall be deemed insufficient nor the trial or judgment vacated by reason of any defect or imperfection in matter of form only, which does not tend to the prejudice of the defendant, and after citing a number of decisions which have disregarded so-called "technical rules of pleading", goes on to say (at page 784),

referring to an accused's right to be informed of the nature of the charge, that

> "Neither the statute nor the decisions was or were intended to qualify or amend, nor could they qualify, amend, or set aside these provisions of the constitution."

Later, in the course of the opinion it is said:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication."

A person indicted for a serious offense is presumably innocent, and the sufficiency of the indictment must be tested upon the presumption that he is innocent, and has no knowledge of the facts charged against him.

Fontana v. United States, 262 Fed. 283.

None of the cases cited in the opinion of this Court uphold the validity of such a pleading as the information in the case at bar. On the contrary, they are all to the effect that the essential facts must be set forth clearly and with particularity. The first case cited is *United States v. Cruikshank,* 92 U. S. 542. In that case, after reiterating the constitutional right of the accused to be informed of the nature and cause of the accusation, the Court quotes with approval the case of *United States v. Mills,* 7 Pet. 142, and *United States v. Cook,* 17 Wall. 174, 21 L. ed. 538, to the effect that the indictment must set forth the offense "with clear-

ness and all necessary certainty, to apprise the accused of the crime with which he is charged", and that "every ingredient of which the offense is composed must be accurately and clearly alleged," and "that it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars."

Indeed, in appellant's opening brief, we cited *United States v. Cruikshank,* as direct authority contrary to the conclusion reached by this Honorable Court.

United States v. Britton, 107 U. S. 655, also cited as authority supporting the information in the case at bar, involved an indictment based on alleged misapplication of the funds of a bank by its president. The indictment contained 119 counts, which renders it too lengthy to set forth even its substance. The Supreme Court held the first thirty-five counts good, and the rest of them bad. Concerning the first thirty-five it is said:

> "These counts embody the language of the statute; they charge every element of the offense created by the statute with sufficient certainty, and give the defendant clear notice of the charge he is called on to defend."

This states the very essentials of a good indictment, essentials which are missing from the information herein.

The only respect in which the first *Britton* case is at all in point in the case at bar is that it lays down the

correct rule for gauging the sufficiency of an indictment—the rule which appellant has urged should govern, and which has not been complied with by the government in drafting the information in the case at bar.

Dunbar v. United States, 156 U. S. 185, 39 L. ed. 390, was an indictment for smuggling opium. The point of the decision was that in charging a statutory offense, "it is unnecessary to resort to the very words of the statute. The pleader is at liberty to use any form of expression, providing only that he thereby **fully and accurately describes the offense** etc." In the case at bar, the information not only does not follow the language of the regulation which appellant is accused of violating, but contains no accurate description of the offense.

Harris v. United States, 104 Fed. (2d) 41, far from upholding the sufficiency of such a pleading as the information in the case at bar, specifically condemns it. The Court there says:

> "When an indictment contains averments necessary to constitute an offense, even though such averments are stated loosely, or without technical accuracy, it is the general rule under such circumstances that where there is a failure on the part of the defendant to attack such an indictment by demurrer or motion to quash, the omissions are cured by the verdict. However, where the challenge to the indictment is based upon an omission in the averments thereof of an essential element of the crime, objection thereto is not waived (Berry v. United States, 9 Cir., 259 Fed. 203); **it may even**

be asserted in this court for the first time. (Citing cases.)

> "The statute enjoins the courts from setting aside judgments grounded upon indictments defective in matters of form only, and which shall not tend to the prejudice of the defendant (Section 556, 18 U. S. C. A.), but the essential elements of the statutory offense must be set out in the indictment. These 'are matters of substance, and not of form, and their omission is not aided or cured by the verdict.' United States v. Hess, 124 U. S. 483, 8 S. Ct. 571, 574, 31 L. Ed. 516. It is the duty of the court under such circumstances to set aside the judgment."

In the concluding paragraphs of the opinion, the Court thus declares the reason for the rule:

> "The basic principle of American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law. In a criminal proceeding the indictment must be free from ambiguity on its face; the language must be such that it will leave no doubt in the minds of the court or defendant of the exact offense which the latter is charged with. It should leave no question in the mind of the court that it charges the commission of a public offense."

Thus the very decisions cited in the opinion refute the conclusion reached by this Honorable Court.

THE INFORMATION DID NOT ADEQUATELY INFORM THE APPELLANT WITH WHAT SHE WAS CHARGED.

The information, which is set forth in its entirety at page 3 of appellant's opening brief, merely alleges that on a certain day, appellant rented to two persons therein named, a certain room "for a rental price of $5 per night for two persons, which said sum of $5 per night for two persons was higher than the maximum price fixed by law, said maximum price then and there being $2 per night for two persons."

The rental price of the room in question was not fixed by any law, but, if fixed at all, was fixed by some regulation adopted by the Price Administrator who derived his alleged powers to fix rents and prices by virtue of the Emergency Price Control Act. Such regulations are declared to have the force of law and their violation is punishable by the infliction of both civil and criminal penalties. Accordingly, the information, to be valid must set forth facts sufficient to constitute the violation of a regulation duly adopted by the Price Administrator in the proper exercise of the powers delegated to him by the act. This the information does not do. It does not plead any regulation or any facts which would show any violation thereof. It merely refers parenthetically to the Regulations for Hotels and Rooming Houses. The opinion states:

> "Under Sec. 11 of said rent regulation the maximum rent to be charged for any room, regularly rented in any defense rental area, must be filed in the Area Rental Office. Once the maximum rent has been so filed it cannot be changed except

> by a formal order by the Area Rent Director pursuant to Sec. 5 of the said regulation. Therefore the maximum rent of the room in question, $2.00, was determined and certain under Sec. 7 of the regulation noted and **so alleged in the information.**"

We submit that the most superficial reading of the information will demonstrate that the foregoing statement is incorrect.

The information does not allege that the room was one "regularly rented"; neither does it allege that there was ever filed in the area rental office the maximum rent to be charged, nor that the administrator ever did or did not make a formal order changing the maximum rent.

No law fixed the maximum rental of this room and **no regulation of the administrator even purports to fix such maximum.** The regulations merely provide various formulae by which a maximum rental can be fixed under varying conditions, the maximum rent differing with the use of each formula.

This Court states that the maximum rent "was determined and certain", but there is neither law nor regulation fixing such rental. Surmise and conjecture have to be indulged in to support the information. This the Court cannot do. (*Asgill v. United States,* supra.)

This Court has indulged in intendments and implications to supply the omission of allegations vital to the validity of the charge. Furthermore, **this Court**

has taken judicial knowledge of something which it has no power so to do and which actually may not have been in existence. While this Court can take judicial knowledge of the regulations promulgated by the administrator, it cannot take judicial knowledge of mere documents filed in the office of the administrator under such regulations.

THIS COURT HAS ERRED IN HOLDING THAT THERE WAS NO NECESSITY TO SET OUT IN THE INFORMATION THE FORMULAE WHEREBY THE MAXIMUM RENT OF THE ROOM WAS ORIGINALLY DETERMINED.

In the opening brief of appellant (page 11, *et seq.*), after setting forth the pertinent provisions of the Rent Regulations *in haec verba,* we stated that the information was insufficient because it contained no allegation that the room in question was rented or regularly offered for rent during the maximum rental period; "that there is no allegation as to the highest rent for the room during the thirty days mentioned, or any period of time, nor is there any averment that the Administrator ever made any order fixing the rent for the room."

In support of our argument in that behalf, we cited *United States v. Johnson,* 53 Fed. Supp. 167.

This Court, without stating any reasons, or citing any authorities, has held it unnecessary to set forth the facts showing that the maximum rental for the room was arrived at in accordance with the provisions of the regulations.

In an attempt to distinguish this case from the case of *United States v. Johnson,* 53 F. Supp. 167, this Court states that in the *Johnson* case there were involved commodities with variable maximum prices, while in the case at bar no variable quantity was involved. If we are correct in assuming that this Court approves the ruling in the *Johnson* case then its decision herein is erroneous. The regulations propounded by the administrator for fixing maximum rentals are just as variable as the regulations fixing the different prices for the commodities involved in the *Johnson* case. As the formula in the *Johnson* case had to be set forth in the accusation therein, so the formula fixing the maximum rental had to be set forth in the accusation herein.

This Court states that if more information was required appellant should have made a motion for a bill of particulars. The failure to move for a bill of particulars cannot supply deficiencies in an indictment, and a defective indictment cannot be cured by the furnishing of a bill of particulars. Such is the ruling of this very Court in the case of *Foster v. United States,* 253 Fed. 481.

CONCLUSION.

It is respectfully submitted that this Court has erred in holding the information sufficient and that a rehearing should be granted.

In the event of a denial of this petition appellant asks for a stay of the mandate of this Court to enable appellant to apply to the Supreme Court of the United States for a writ of certiorari.

Dated, San Francisco, California,
September 25, 1946.

LEO R. FRIEDMAN,
Attorney for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
September 25, 1946.

Leo R. Friedman,
Counsel for Appellant and Petitioner.